State, 36 Tex. Crim. Rep. 320, the contrary rule was adopted,, only to be overthrown by the subsequent decision in *Porch* v. *State,* 51 Tex. Crim. Rep. 7. But where the witness is absent from the jurisdiction, various conditions have been imposed by the different courts as essential in order that his former testimony may be given. It has been said that the absence must be by way of residence, and not merely a temporary sojourn, because otherwise the trial could be postponed until his return. *Jacobi* v. *State,* 133 Ala. 1; or that an effort should be made to persuade the witness' voluntary attendance, *Slusser etc.* v. *Burlington,* 47 Iowa 300. It has also been suggested that an effort should have been made to obtain the witness' deposition by commission. *Berney* v. *Mitchell,* 34 N. J. L. 337. But this is futile, for a deposition is no better than the former testimony. WIGMORE EVIDENCE, § 1404. Many states recognize the absence of the witness as a ground for the admission of his former testimony generally. *State* v. *Nelson,* 68 Kan. 566, *Hurley* v. *State,* 29 Ark. 17, *Adair* v. *Adair,* 39 Ga. 75, *Wheeler* v. *Jenison,* 120 Mich. 422, *Wheeler* v. *McFerron,* 38 Or. 105. A few refuse to recognize it at all. *Wilbur* v. *Selden,* 6 Cow. 162, *Crary* v. *Sprague,* 12 Wend. 41, *Berney* v. *Mitchell,* 31 N. J. L. 337, *Collins* v. *Com.,* 12 Bush. 273, *State* v. *Lee,* 13 Mont. 248. Others refuse to recognize the rule in criminal cases. *Owens* v. *State,* 63 Miss. 450, *State* v. *Houser,* 26 Mo. 431, *Finn* v. *Com.,* 5 Rand. 701, *Brogy* v. *Com.,* 10 Gratt. 722. In *State* v *Conklin,* 133 N. W. 119 the Iowa court, divided as in the principal case, held that even where the testimony of the absent witness had not been taken down in shorthand it was permissible for one who had heard it to give the substance thereof against the accused.

EXECUTION SALE—RIGHT OF PURCHASER ON FAILURE OF TITLE. Plaintiff was a bona fide purchaser of chattels at an execution sale; the chattels were later replevined as the property of a third party and plaintiff sued the execution creditor for money had and received. *Held,* that the purchaser could recover the sum paid by him. *Dresser* v. *Kronberg* (Me. 1911) 81 Atl. 487.

The general rule is that there is no warranty of title at an execution sale, the purchaser takes just what title the defendant in execution had and buys at his peril, the rule of *caveat emptor* applying. *Green* v. *Wintersmith,* 85 Ky. 516. *Barnett* v. *Vincent,* 69 Tex. 685, 5 Am. St. Rep. 98; *Lewark* v. *Carter,* 117 Ind. 206, 10 Am. St. Rep. 40, 3 L. R. A. 440. In the principal case the court allowed a recovery of the full amount paid, which is equivalent to making the sale on execution a sale with warranty of title, the usual amount recoverable for a failure of title in such cases being the amount paid. SUTHERLAND DAMAGES Ed. 3, § 666. *Jeffers* v. *Easton,* 113 Cal. 345, 45 Pac. 680; *Noel* v. *Wheatley* 30 Miss. 181; *Anding* v. *Perkins,* 29 Tex. 348. The question of what remedies if any are to be allowed the purchaser of goods at an execution sale, upon failure of title in the execution defendant, is one upon which there is much conflict of opinion. It has been held by the supreme court of Indiana that if payment has not been made it may be resisted for a failure of title, *Julian* v. *Beal,* 26 Ind. 220, 89 Am. Dec. 460. This rule has been denied in the courts of other States. *McGhee* v. *Ellis,* 4 Litt. 244; *Cameron* v. *Logan,* 8 Iowa 434;

Humphrey v. *Wade*, 84 Ky. 391. Where the money has been paid into the hands of the clerk the purchaser cannot recover it. *Dunn* v. *Frazier*, 8 Blackf. 432; *Whitmore* v. *Parks* 22 Tenn. 95. If the money is merely paid to the officer, it has been held it can be recovered. *Bartholomew* v. *Warner*, 32 Conn.98; *Bragg* v. *Thompson*, 19 S. C. 572. Where a stranger to the proceedings has paid money at an execution sale for property not belonging to the defendant in the execution, he may recover this amount in an action against the judgment debtor, as money paid to his use. *Preston* v. *Harrison*, 9 Ind. 1; *McLean* v. *Martin*, 45 Mo. 393. And it is generally held that where an execution sale is set aside, the satisfaction may be set aside and a new execution awarded on *scire facias*. *Magwire* v. *Marks*, 28 Mo. 193; *Adams* v. *Smith* 5 Cow. 280; *Cross* v. *Zane*, 47 Cal. 602. No case like the present is cited by the court in its opinion, and none has been found, though the case of *Sanders* v .*Hamilton*, 3 Dana (Ky.) 550 resembles it in some respects. Perhaps if the doctrine of warranty of title in execution sales of chattels had been established in the beginning it would have been a better rule. The effect of such a rule would undoubtedly be to increase the price paid for goods sold on executions, by placing the duty of ascertaining and warranting the title on the real seller, the execution creditor. And it would seem that since the creditor would be in no worse position if the title proved defective than if no sale were made, such a rule would not impair the usefulness of such sales to the execution creditor. At present the rule that there is no warranty of title in execution sales of chattels is clearly established. .*England* v. *Clark*, 5 Ill. 486; *Salmon* v. *Price*, 13 Ohio 368, 42 Am. Dec. 204:*The Monte Allegre*, 9 Wheat 616; *Lewark* v. *Carter*, 117 Ind 206. On the other side of the question there are reasons other than precedent for refusing to allow a recovery in a suit against the execution creditor, for as Mr. Freeman aptly says, "Such an action is necessarily founded upon a mistake of law. The purchaser is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is a well known fact that a mistake of law is ordinarily not a sufficient foundation for relief at law nor in equity. FREEMAN EXECUTIONS, Ed. 3, § 352.

HUSBAND AND WIFE—TENANCY BY THE ENTIRETY—EXECUTION.—Plaintiffs, husband and wife, were owners as tenants by the entirety of a parcel of land when a joint judgment was taken against them. Execution issued and levy was made upon the estate. After the usual formalities a deed to the land was made to defendants. Plaintiffs in this action asked that their title to the estate as tenants by the entirety be quieted and that defendants be ejected from the land. *Held*, that the estate by the entirety was liable on a joint execution against the plaintiffs. *Sharp et al* v. *Baker* (Ind. App. 1911) 96 N. E. 627.

The Indiana court is here confronted with an argument by plaintiffs' counsel that the estate by the entirety is one created for the use and benefit of the husband and wife during coverture and intended to be preserved as a sort of a homestead. There is discoverable no report of a previous decision of the point. Consequently this court reaches its decision by means of an ex-